IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

LESTER J. ALBRECHT,
Petitioner,

vs.

THE HERALD COMPANY, a Corporation, d/b/a
GLOBE-DEMOCRAT PUBLISHING COMPANY,
Respondent.

MOTION TO DISMISS FOR WANT OF JURISDICTION WITH SUPPORTING BRIEF.

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St. Louis Law Printing Co., Inc., 411-15 N. Eighth St., 63101. CEntral 1-4477.

INDEX.

Cases Cited.

Rules and Statutes Cited.

Miscellaneous.

No. 975.

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Comes now respondent, and pursuant to Rule 35 of the rules of this Court moves the Court to dismiss the writ of certiorari granted in this case; and for grounds of its motion alleges that this Court has no jurisdiction to accord petitioner relief, because the sole predicate of its jurisdiction of his claim is 15 U. S. C. 15, and that statute, both as it is sought to be applied in this case, and on its

face, is unconstitutional under the following provisions of the United States Constitution:

Article II:

Sect. 1: "The executive power shall be vested in a President of the United States of America."

Sect. 2: "The President . . . shall have power to grant reprieves and pardons for offenses against the United States."

Sect. 3: ". . . he shall take care that the laws be faithfully executed, and shall commission all officers of the United States."

Amendment IV:

". . . no warrant shall issue but upon probable cause, supported by oath and affirmation, and particularly describing the place to be searched and the person or thing to be seized."

Amendment V:

Cl. 2: ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."

Cl. 3: ". . . nor shall be compelled in any criminal case to be a witness against himself . . ."

Cl. 4: ". . . nor be deprived of life, liberty, or property, without due process of law . . ."

Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . ."

Amendment VII:

". . . no fact tried by a jury shall be otherwise reexamined in any Court of the United States than according to the rules of common law."

Amendment VIII:

"... nor [shall] excessive fines [be] imposed, nor cruel and unusual punishment inflicted."

Respondent respectfully requests that in view of the importance of the question the motion be assigned for oral argument pursuant to Rule 35 (3).

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BRIEF.

(a) Opinion.

The opinion of the Court of Appeals sought to be reviewed by this writ is reported in 367 F. 2d 517. It is set out at page 145, et seq. of the transcript.

(b) Jurisdiction.

Jurisdiction in the United States Courts of the petitioner's claim is predicated wholly on 15 U. S. C. 15 (T. 13), since Count I was voluntarily dismissed (T. 20).

"Statutes Involved" in this Court is stated to be Section 4 of the Clayton Act, 15 U. S. C. 15 (petition, page 2). The opening words of the opinion (367 F. 2d 518; T. 145) are:

> "This is a treble damage action under § 4 of the Clayton Act, 15 U. S. C. A., § 15 . . ."

(c) Constitutional Provisions and Statutes Involved.

15 U. S. C. 15, provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee."

The constitutional provisions involved are set forth in the body of the motion, supra.

(d) Question Presented.

The question presented by the motion is simply whether 15 U. S. C. 15 is constitutional,

(e) Statement of the Case.

For the purposes of the motion, it is sufficient to state that the action is one for treble damages under 15 U. S. C. 15.

(f) Summary of Argument.

Anti-trust treble damage suits are, to the extent of the doubled and trebled award, actions to impose a punishment upon the defendant in the right of the United States for the violation of a criminal statute. Since the trebling is done by the Court, after a jury finding as to the amount of the plaintiff's damages, the trebled product cannot be compensatory or remedial; because the fact of the extent of plaintiff's damages has been found by a jury, and under Amendment VII to the Constitution this fact cannot be re-examined.

In constitutional law it is the substance and effect of a given statute which must be tested against the Constitution, and not merely its form. The substance and effect of the trebling provision of this statute is to impose punishment for a public offense. It was so stated by the authors of the Act at the time of its original enactment. It has been so interpreted in connection with the application of the federal income tax laws, in connection with determining whether the action survives against a dead defendant, and otherwise.

As a means of inflicting punishment for a public offense, the basic unconstitutionality of the statute is under Article II of the Constitution, which gives the power to execute the laws of the United States, including the right

to grant reprieves and pardons for offenses against the United States, exclusively to the President of the United States, and gives the President alone the power to commission officers of the United States. This statute, by its terms, gives a part of the presidential power of executing the laws to a random plaintiff who is not commissioned by the President, and deprives the President of the power to grant a pardon for the offense. If one crime can be punished by this type of civil action, so can any crime, and then all crimes, so that the President need not fulfill his constitutional function of enforcing the laws at all, and law enforcement becomes wholly retributive, as it was at the dawn of civilization.

By casting the statutory method of imposing punishment for the commission of a federal crime in the mold of a civil action the statute unconstitutionally finesses a number of the protections guaranteed by the Bill of Rights to a citizen threatened with such punishment, including those dealing with double jeopardy, self-incrimination, deprivation of property without due process, right to jury trial, prohibition of excessive fines, and the requirement of oaths for search warrants. The constitutional absurdity of inflicting punishment for a criminal offense by a civil action, as this statute does, is demonstrated by hypothesizing a statute authorizing a civil punishment *by incarceration*, rather than of punishment *by treble damages*. As punishments, the two are constitutionally indistinguishable.

Since the litigation depends in this Court as well as in the Courts below upon the constitutionality of this statute, this Court has no jurisdiction to take any action other than to dismiss the appeal.

(g) Argument.

1. Constitutionality Clearly Before the Court.

Considering the hundreds of millions of dollars which must have changed hands under this statute, it is almost inconceivable that the Supreme Court of the United States has never been asked directly to pass upon its constitutionality under these provisions; yet, so far as we have found, this is the case.* The statute is three-quarters of a century old, but neither its venerability nor the failure of generations of lawyers to challenge its constitutionality can shield it from the acid test of conformity to the Constitution when the point is properly presented.

It is true that the constitutionality of this statute is raised in this litigation for the first time in this Court; yet the respondent was successful in the District Court and successful in the Court of Appeals, and under uniform interpretations of appellate procedure a respondent may urge any ground upon which this Court can affirm the judgment challenged by an appellant or petitioner. Jaffke v. Dunham, 352 U. S. 280, 77 S. Ct. 307, 1 L. Ed. 2d 314. This is because the question before this Court is whether or not the judgment appealed from was correct. The propriety of the ground upon which the Court below decided the case is not a subject of inquiry. Davis v. Packard, 31 U. S. 41, 6 Pet. 41, 8 L. Ed. 312.

Jurisdiction of the United States Courts, including this Court, over this action, can arise only from the grant thereof by Congress in 15 U. S. C. 15. If the statute is unconstitutional, the judgment for the defendant below is correct, and this Court has no jurisdiction to disturb it.

Therefore, before assuming the jurisdiction to answer the Question Presented in the Petition of whether the

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* Chattanooga P. W. v. Atlanta, infra, p. 14, considered only (and only passingly) the legality of compensatory damages.

case should be reversed and remanded, this Court must first determine the constitutionality of 15 U. S. C. 15.

The constitutional obligation of the Court to examine every properly challenged enactment against the Constitution was never more effectively explained than in the closing paragraphs of the opinion of Trop v. Dulles, 356 U. S. 86, 78 S. Ct. 590, 599-600, 2 L. Ed. 630:

> "In concluding as we do that the Eighth Amendment forbids Congress to punish by taking away citizenship, we are mindful of the gravity of the issue inevitably raised whenever the constitutionality of an Act of the National Legislature is challenged. No member of the Court believes that in this case the statute before us can be construed to avoid the issue of constitutionality. That issue confronts us, and the task of resolving it is inescapably ours. This task requires the exercise of judgment, not the reliance upon personal preferences. Courts must not consider the wisdom of statutes but neither can they sanction as being merely unwise that which the Constitution forbids.
>
> "We are oath-bound to defend the Constitution. This obligation requires that congressional enactments be judged by the standards of the Constitution. The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights . . .
>
> "The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation. They are the rules of government. When the constitutionality of an Act of Congress is challenged in this Court, we must apply those rules. If we do not, the words of the Constitution become little more than good advice.
>
> "When it appears that an Act of Congress conflicts with one of these provisions, we have no choice

but to enforce the paramount commands of the Constitution. We are sworn to do no less. We cannot push back the limits of the Constitution merely to accommodate challenged legislation. We must apply those limits as the Constitution prescribes them, bearing in mind both the broad scope of legislative discretion and the ultimate responsibility of constitutional adjudication. We do well to approach this task cautiously, as all our predecessors have counseled. But the ordeal of judgment cannot be shirked. In some 81 instances since this Court was established it has determined that congressional action exceeded the bounds of the Constitution. It is so in this case."

2. Form Versus Substance in Constitutional Law.

Central to the application here of the quoted constitutional provisions is whether the object of the treble damages statute is *to inflict punishment*. That is, in the sense of the Constitution: does the statute impose *jeopardy* (Amendment V) of *punishment* or a *fine* (Amendment VIII) for an *offense* against the United States (Art. II, Sec. 2 and Amendment V, Cl. 2)? Is a proceeding under it *any criminal case* (Amendment V, Cl. 3)? Are the safeguards which due process imposes upon sanctions by the sovereign applicable to such a proceeding (Amendment V, Cl. 4)? Is the legislative scheme of enforcing the criminal laws by random civil suits for more than actual damages a usurpation of the President's exclusive executive authority, including his authority to pardon; and does it make of the treble damage plaintiff an *officer of the United States* without presidential commission (Art. II, Secs. 2, 3)?

In form the action is a civil suit. In the numbering systems commonly employed in the District Courts the Court number is preceded by the letter "C" rather than

"CR"; the first pleading is called a "complaint", not an "information" or "indictment"; the rules of civil rather than criminal procedure are applied, etc.

But in constitutional law no proposition is more firmly founded than that it is the substance of the action which controls, not its form.

By the language of a unanimous court in Trop v. Dulles, 356 U. S. 86, 94, 95, 78 S. Ct. 590, 594, 595, 2 L. Ed. 630, this Court has made this clear. The Court held (l. c. 595):

> "The constitutional question posed by Section 401 (g) would appear to be whether or not denationalization may be inflicted as a punishment, even assuming that citizenship may be divested pursuant to some governmental power. But the Government contends that this statute does not impose a penalty and that constitutional limitations on the power of Congress to punish are therefore inapplicable. We are told this is so because a committee of Cabinet members, in recommending this legislation to the Congress, said it 'technically is not a penal law.' How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them! Manifestly the issue of whether Section 401 (g) is a penal law cannot be thus determined.
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> * * * * * * * *
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> "In form Section 401 (g) appears to be a regulation of nationality. The statute deals initially with the status of nationality and then specifies the conduct that will result in loss of that status. But surely form cannot provide the answer to this inquiry. A statute providing that 'a person shall lose his liberty by committing bank robbery,' though in form a

regulation of liberty, would nonetheless be penal. Nor would its penal effect be altered by labeling it a regulation of banks or by arguing that there is a rational connection between safeguarding banks and imprisoning bank robbers. The inquiry must be directed to substance."

This is not a new thought.

In 1878 this Court wrote in Burgess v. Salmon, 97 U. S. 381, 385, 24 L. Ed. 1104:

> "The cases cited hold that the *ex post facto* effect of a law cannot be evaded by giving a civil form to that which is essentially criminal."

In U. S. v. Chouteau, 102 U. S. 603, 611, 26 L. Ed. 246, 249, this Court held:

> "Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term penalty involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution."

And, following Chouteau, in U. S. v. La Franca, 282 U. S. 568, l. c. 572, 575, 51 S. Ct. 278, 280, 281, 75 L. Ed. 551, this Court held:

> "A 'tax' is an enforced contribution to provide for the support of government; a 'penalty', as the word is here used, is an exaction imposed by statute as punishment for unlawful act. The two words are not interchangeable one for the other. No mere exercise of the art of lexicography can alter the essential nature of an act or thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such . . .

"But an action to recover a penalty for an act declared to be a crime is, in its nature, a punitive proceeding, although it takes the form of a civil action."

In Giaccio v. Pennsylvania, 382 U. S. 399, 402, 86 S. Ct. 518, 520, the Court held:

"Both liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the single label a State chooses to fasten upon its conduct or its statute. So here this state act whether labeled 'penal' or not must meet the challenge that it is unconstitutionally vague."

In U. S. v. Witherspoon, 211 F. 2d 858, 860, 861, the Court held:

"[1, 2] We are of the opinion that the action is one for penalties. A statute is penal where the purpose is to punish an offense against the public justice, as distinguished from an action affording a private remedy for injury by a wrongful act; the word, 'penalty', strictly and primarily denotes punishment, imposed and enforced by the state, for an offense against its laws.

* * * * * * *

"[3] 'By damages is understood the indemnity, or composition in money, which the law gives to the injured party for the breach of a contract or a duty. In theory, such damages are precisely commensurate with the injury received, except in the case of exemplary damages or smart money, where some element of fraud, malice, gross negligence, or oppression enters into the controversy. A penalty, on the other hand, is the punishment, generally pecuniary, in-

> flicted by a law for its violation. It has no reference to the actual loss sustained by him who sues for its recovery.' "

It may be that respondent will attempt to distinguish this statement of the law from the procedure here challenged because of the phrase "enforced by the state" in the expression "primarily denotes punishment, imposed and enforced by the state." Respondent may argue that the penalty of the treble damage section is enforced not by the state or nation, but by the action of a private citizen. If he does so argue, we point out that this court has expressly held in Shelley v. Kraemer, 334 U. S. 1, 21, 68 S. Ct. 836, 845, 92 L. Ed. 1161, that *the granting of judicial enforcement* in private litigation constitutes enforcement by the state, for constitutional purposes. It said:

> "We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws, and that, therefore, the action of the state courts cannot stand."

In U. S. v. Dickerson, 168 Fed. Supp. 899, 902, Judge Holtzoff, foreshadowing Application of Gault, 35 L. W. 4399, 87 S. Ct. 1428 expressed the idea in the following powerful words:

> "Precious constitutional rights cannot be diminished or whittled away by the device of changing names of tribunals or modifying the nomenclature of legal proceedings. The test must be the nature and the essence of the proceeding, rather than its title."

Basically, this was the reasoning which prompted this court to require Fourth Amendment search warrants to support building and fire ordinance inspections in Camara

v. San Francisco and in Lee v. Seattle, 35 L. W. 4517, 4522, June, 1967. The effect upon the householder was the same, the court concluded, whether the entry was in a criminal investigation or in an effort to avoid unsafe building conditions.

This rule of substance over form in constitutional law is equally applicable in the consideration of State action.

In New York Times v. Sullivan, 376 U. S. 254, 277, 84 S. Ct. 710, 724, 11 L. Ed. 2d 686, this Court said:

> "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel."

In considering the constitutionality of this statute, we must, therefore, address ourselves to its substance and effect, and not its form.

3. The Substance of Treble Damage Awards.

An action for damages is for compensation: i. e., restoration, as nearly as possible, to the status quo ante. Such an action is not for punishment.

> "There can be no doubt that Congress had power to give an action for damages to an individual who suffers by breach of the law." Chattanooga F. & P. Works v. Atlanta, 203 U. S. 390, 27 S. Ct. 65, 66.*

This is exactly what Congress did in enacting 15 U. S. C. 15 (a), reading:

> "Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the anti-trust laws it may sue therefor in the United States District Court for the district in which

* In this opinion the validity of the trebling of the damages afforded by the statute was not discussed.

the defendant resides or is found or has an agent, without respect to the amount in controversy, and *shall recover actual damages by it sustained* and the cost of suit."

But this is not the power exercised by the Congress in enacting Section 7; for instead of the phrase "and shall recover actual damages by it sustained", the challenged section says: "and shall recover threefold the damages by him sustained."

15 U. S. C. 15 reads:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and *shall recover threefold the damages by him sustained*, and the cost of suit, including a reasonable attorney's fee."

The cobwebs obscuring the critical differences between the two types of recovery sanctioned by 15 U. S. C. 15 and 15 U. S. C. 15 (a) are brushed away in the opinion of Fay v. Parker, 53 N. H. 342 (1872), as follows:

"A synonym of *damage* (when applied to a person sustaining an injury) is *loss*. Loss is the generic term. Damage is a species of loss. Loss signifies the act of losing, or the thing lost. Damage—in French, *dommage;* Latin, *damnum*, from *demo*, to take away—signifies the thing taken away,—the lost thing, which a party is entitled to have restored to him so that he may be made *whole* again.

"Damage, we remarked, is derived from *demo*, to take away; and therefore it is not derived from *punio*, to punish.

"When used to signify the money which a plaintiff ought to recover, damage is never, nor in any sense, synonymous with nor collateral to the terms example, fine, penalty, punishment, revenge, discipline, or chastisement.

"Loss or damage sustained—the thing taken away—may be supplied by compensation; but the loss, damage, or thing taken away cannot be supplied or restored by the vindictive punishment of him who has occasioned the loss or damage.

"It is just as easy to call things by their right names as by wrong names, and it is better to be correct than careless in our speech."

Thus 15 U. S. C. 15, unlike 15 U. S. C. 15 (a), is not,—as to the double and treble awards,—damages, i. e., compensation, recompense, remedy.

Then what is it, *in substance?* By logic, by history and by judicial interpretation, it is *punishment.*

4. Logical Approach.

The word "damages" in the statute, in the language of logic, is a *general* term. It means "all damages". Indeed, the verdict, in this type of case, is only for the amount of the plaintiff's damages. It is the Court, not the jury, that does the trebling. The charge in this very case so instructed the jury (T. 130):

"That is the amount of damages as you find from the evidence in the case is reasonably necessary to compensate the plaintiff for any injury to his business or property proximately caused by one or more of the violations of the antitrust laws which you find the defendant has committed."

If we treble all the plaintiff's damages, the trebled product cannot *also* be all the plaintiff's damages. Three

times one is three, not one. Indeed, if one were to seek to steer around the constitutional infirmities by arguing that the trebled damages are not a penalty, but are compensatory, he would necessarily pile up on the reef of the Seventh Amendment:

> ". . . no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

The extent of the plaintiff's damages is tried and determined by the jury's verdict. If the Court-trebled judgment be regarded, for constitutional treatment, as plaintiff's *damages,* then the Court has substituted its own (more properly, Congress's) finding of plaintiff's damages for that found by the jury, an action impermissible under the Seventh Amendment.

The trebled verdict has to be, in all logic, plaintiff's damages, plus a penalty, fixed by the statute at twice the amount of damages, and attorneys' fees.

5. Legislative Intent.

It happens that the intent of Congress in originally enacting Section 7 is preserved with extraordinary explicitness in the Congressional Record. Vol. 21, Part 4, Congressional Record, 51st Congress, pp. 3146, 3147; also 3149.

In Haskell v. Perkins, D. C., N. J., 28 F. 2d 222, 223, reversed on other grounds, 3rd Cir., 31 F. 2d 53, cert. den. 279 U. S. 872, 73 L. Ed. 1007, 49 S. Ct. 513, the Court summarized this record as follows:

> ". . . the trebling of the damages and the addition of an attorney's fee can be regarded in no other way than as a burden laid upon an alleged wrongdoer by way of penalty or punishment.

"The records of the introduction and passage of this act have been made available, and it is interesting, in connection with this dispute, to pursue the account of proceedings in the Senate and House at the time the Sherman Act, so called, was made law. Apparently an argument was precipitated through an effort made by a Senator from Texas, who offered an amendment to provide that under this section suit might be brought, not only in the federal courts, but alternatively in any state court, and during the course of the debate which ensued Senator Hoar, of Massachusetts, who was in charge of the bill, and who probably was in large measure the author of the same in its final form, spoke as follows, regarding this very section 7:

" 'What I wish to point out to the Senate and to the Senator from Texas is this: This section, which is proposed to be amended, is a section establishing a penalty, threefold damages. Now, you cannot clothe a state court with the authority to enforce a penalty. If we create a legal right like a debt by a United States statute, then undoubtedly a state court of general jurisdiction, which has authority to enforce and aid in the collection of debts, without express enactment by the Congress of the United States, would sustain an action to recover that debt . . .

" 'But, when you come to penalties, no court enforces penalties except those created by the authority which creates the court, and no statute of any foreign or other authority but that can clothe the court with that power. . . . We might perhaps say that a person who owed to another a sum of money under an obligation solely the creature of a statute of the United States might recover in any state court; and if the obligation were created he could recover it

equally, whether he said so or not: but we cannot say that a state court shall be clothed with jurisdiction to enforce a claim for threefold damages suffered, which is purely penal and punitive.'

"And at that point Mr. Morgan, Senator from Alabama, asked the following question: 'And the attorney's fee?' To which Mr. Hoar replied: 'Yes; and the attorney's fee. So I submit to my honorable friend from Texas that his amendment, though intended in the same direction as the bill is intended, will not bear examination.'

"There is much of the same nature in the further consideration of this law as set forth in the congressional proceedings, and from it there is no other conclusion to be drawn than that Senator Hoar, of Massachusetts, Senator Morgan, of Alabama, and Senator Edmunds, of Vermont, all of them eminent lawyers, regarded the trebling of damages and the attorney's fee as constituting a penalty."

To this we might add only the comment of Senator George of Mississippi on the introduction of the Sherman Act (ibid. p. 1771):

"The bill is a proposition for the enactment of a penal or criminal statute. It does nothing but inflict penalties, either by civil or criminal procedure."

6. Judicial Interpretation.

A federal tax is imposed upon income. If a litigant recovers back what was formerly his own, or its equivalent in damages, he is regarded as not having realized income. Cf. Fay v. Parker, supra, 53 N. H. 342. It is possible that he may claim to have suffered a bodily loss, as of a leg, or a capital loss, as, in Albrecht's claim, the loss of a part of a route which he paid for. In either such case,

damages which he may recover for such a loss are not taxable [Bodily injury: 26 U. S. C. 104 (a) (1) and (2); capital: Farmers' and Merchants' Bank v. C. I. R., 59 F. 2d 912]; on the theory that in neither case does the taxpayer receive *gain*, but merely gets back even.

It is possible that the litigant may be damaged by loss of profits, in which case the recovery of damages in lieu of lost profits will be taxed as income, as the profits themselves *would have been*. *Phoenix Coal Co. v. C. I. R.*, 231 F. 2d 420.

And it is also possible that the litigant may recover treble damages under the antitrust laws. If such so-called damages were actually damages, that is, compensatory, they should not be taxable. But the Commissioner of Internal Revenue has always treated them not as compensation, but as gain. And the Courts have upheld him.

In C. I. R. v. Obear-Nester Glass Co., 217 F. 2d 56, the Court stated the issue as follows:

> "'The only question before us is whether or not punitive damages awarded under the federal antitrust acts constitute gross income . . .'"

Holding that they do, the Court reasoned as follows (l. c. 61-62):

> "The respondent suggests that by allowing the taxation of treble damages awarded under the antitrust acts, we would be defeating Congress' attempt to encourage the prosecution of violators of these acts. The first answer to this contention is that once it is established that the award involved here is income and comes within the coverage of Section 22 (a), Congress must specifically provide for its exclusion or deduction by statute if it so desires. We might further say that the principal purpose of treble dam-

ages seems to be punishment which will deter the violator and others from future illegal acts. Compensation for actual damages is enough to encourage legal action, not to mention the substantial amount of punitive damages the injured party still retains after taxes are paid.

"Respondent's argument works against it, for if, as respondent suggests, punitive damages were intended principally to encourage the uncovering of anti-trust violators, then it might be said that the taxpayer 'earned' the punitive damages by prosecuting the action for the recovery. If this interpretation were made, the punitive damages here would fall within the Eisner v. Macomber definition as gain derived from labor."

Certiorari was denied, 348 U. S. 982, 75 S. Ct. 570, 99 L. Ed. 764, and 349 U. S. 948, 75 S. Ct. 870, 99 L. Ed. 1274. In this instance the denial of certiorari takes significance from the circumstances that this Court had shortly before rendered its opinion in C. I. R. v. Glenshaw Glass Co., 348 U. S. 426, 75 S. Ct. 473, 99 L. Ed. 483, which decided the same issue.

In Glenshaw (l. c. 428, 475):

". . . the parties concluded a settlement of all pending litigation, by which Hartford paid Glenshaw approximately $800,000. . . . it was ultimately determined that, of the total settlement, $324,529.94 represented payment of punitive damages for fraud and anti-trust violations."

Holding these amounts taxable income, the Court held (l. c. 431, 477):

"Here we have instances of undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion. The mere fact that *the pay-*

ments were extracted from the wrongdoers as punishment for unlawful conduct cannot detract from their character as taxable income to the recipients."

What is this if not a declaration by the Chief Justice for a unanimous Supreme Court that it is a fact that double and treble damages under 15 U. S. C. 15 are *extracted from wrongdoers as punishment for unlawful conduct?*

In Sun Theatre Corp. v. RKO Radio Pictures, 7th Cir., 213 F. 2d 284, 287 (1954), the Court held:

"The statute is explicit; the only remedy provided therein is 'threefold the damages' sustained. Giving to this language its plain meaning, we think the only permissible interpretation is that the remedy afforded is treble damages, penal in nature and susceptible therefore to all restrictions surrounding an action of such nature. The remedy has been so treated by this court in Bigelow v. RKO Radio Pictures, Inc., 7 Cir., 150 F. 2d 877, reversed on other grounds, 327 U. S. 251, 66 S. Ct. 574, 90 L. Ed. 652, wherein the court said, 150 F. 2d at page 882: 'The amount of this verdict was required by statute to be trebled by the judgment. In this respect neither the jury nor either court had any discretion. The verdict should represent actual damages sustained, and two-thirds of the judgment is a penalty which Congress has seen fit to impose . . .'"

In Rogers v. Douglas Tobacco Board of Trade, 5th Cir., 244 F. 2d 471, 483 (1957), cert. den. 361 U. S. 833, 80 S. Ct. 85, 4 L. Ed. 2d 75, the Court held:

"Trebling of the damages seems to us to be in the nature of a penalty for the public wrong . . ."

In Englander Motors, Inc. v. Ford Motor Co., 186 Fed. Supp. 82, 85 (1960), the Court held:

"It appears that federal authorities in general treat a Section 4 action as one both remedial and penal or punitive in nature. Judge Learned Hand expresses it in this manner:

" 'The remedy . . . is not solely civil; two-thirds of the recovery is not remedial and inevitably presupposes a punitive purpose.' Lyons v. Westinghouse Elec. Corp., 2 Cir., 222 F. 2d 184, at page 189, certiorari denied, 1955, 350 U. S. 825; 76 S. Ct. 52, 100 L. Ed. 737.

* * * * * * *

"The total recovery which any aggrieved litigant receives is arbitrarily computed, using actual loss only as a base. Undoubtedly, one of the prime purposes in allowing recovery three times the amount of actual damage was to encourage private enforcement of the anti-trust laws, and for this purpose Congress could have decided upon any percentage of the verdict as a penalty superimposed. That Congress settled on three times the actual damage is of no moment here.

"The essential nature then of a treble damage action under the Clayton Act, as we construe the numerous decisions on the subject, is one which grants an aggrieved party actual damages as a compensatory or remedial recovery, and then imposes a penalty by tripling the actual damage as a deterrent against violations of the anti-trust laws, when otherwise such violations might well go undetected and unprosecuted by the government itself."

The question has arisen whether a treble damage action under this section survives the death of the wrongdoer, upon the principle that actions for recompense survive; actions for punishment do not.

It was solved in Rogers v. Douglas Tobacco Board of Trade, 244 F. 2d 471, 483 (1957), cert. den. 361 U. S. 833,

80 S. Ct. 85, 4 L. Ed. 75, by a judgment of Solomon, unjustifiable under the explicit wording of the statute, but pragmatic. The judgment was divided into thirds. The double and treble awards were vacated. The Court held:

> "[7] Combinations in restraint of trade or tending to create or maintain a monopoly gave rise to causes of action at common law. As we noted in Kinnear-Weed Corp. v. Humble Oil & Refining Co., 5 Cir., 214 F. 2d 891, 893, however, public injury alone justifies the threefold increase in damages.
>
> "[8] The policy of the federal statement, we think, requires the survival of the cause of action to the extent that actual damages may be recovered. Trebling of the damages seems to us to be in the nature of a penalty for the public wrong, and we do not think that the personal representatives would be liable for more than actual damages. A different result would not be required even if the question were determined by the law of the State of Georgia.
>
> "The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion."

Accord: Haskell v. Perkins, 28 F. 2d 222.

By logic, by legislative intent, and by judicial interpretation, the concept of treble damages is, for purposes of constitutional application,—i. e., in "essence" (in Judge Holtzoff's phrase) or in "substance" (in the Chief Justice's phrase),—*"purely penal and punitive"* (in Senator Hoar's phrase), "and inevitably presupposes a punitive purpose" (in Judge Learned Hand's phrase).

In a word, the double and treble judgment imposed by the statute is not damages at all: it is PUNISHMENT.

7. The Developing Constitution.

Because treble damages were known to the pre-constitution common law of England, we should remind ourselves that the United States Constitution was not adopted to enshrine the English common law, but to pick and choose from it, and that our Constitution itself is a developing document, retaining its basic ideas, but adapting the manifestation of these ideas to contemporary political morality.

In Bartkus v. Illinois, 359 U. S. 121, 127, 79 S. Ct. 676, 680, 3 L. Ed. 2d 684, this Court said that the Due Process clause

> ". . . was intended to be a flexible concept, responsive to thought and experience—experience which is reflected in a solid body of judicial opinion, all manifesting deep convictions to be enfolded by a process of 'inclusion and exclusion.' "

In Trop v. Dulles, 356 U. S. 86, 78 S. Ct. 590, 598, 2 L. Ed. 630, the Court held:

> "The [Eighth] amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

In Griffin v. Illinois, 351 U. S. 12, 20, 21, 76 S. Ct. 585, 591, Justice Frankfurter, concurring, said:

> " 'Due Process' is, perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society. But neither the unfolding content of 'due process' nor the particularized safeguards of the Bill of Rights disregard procedural ways that reflect a national historic policy."

Among the "evolving standards of decency" is the belief that private vengeance—the code duello, the feuds

of the Hatfields and the McCoys, the letters of marque and reprisal,—are relegated to a less civilized past, and that punishment is the prerogative of the sovereign, and of the sovereign alone.

In the Encylopedia Brittanica article "Punishment" (11th Ed., Vol. XXII, p. 653), appears the following:

> ". . . The progress of civilization has resulted in a vast change alike in the theory and in the method of punishment. In primitive society punishment was left to the individuals wronged or their families, and was vindictive or retributive: in quantity and quality it would bear no special relation to the character or gravity of the offense. Gradually there would arise the idea of proportionate punishment, of which the characteristic type is the *lex talionis*, 'an eye for an eye.' The second stage was punishment by individuals under the control of the state, or community; in the third stage, with the growth of law, the state took over the primitive function and provided itself with the machinery of 'justice' for the maintenance of public order. Henceforth crimes are against the state, and the exaction of punishment by the wronged individual is illegal (cf. Lynch Law) . . ."

To the same effect are these sentences from U. S. v. National Lead Co., 332 U. S. 319, 338, 67 S. Ct. 1634, 1643, 91 L. Ed. 2077:

> "This is a civil, not a criminal, proceeding. The purpose of the decree, therefore, is effective and fair enforcement, not punishment."

Basically, what is wrong with 15 U. S. C. 15 is that it delegates at random the *power to punish*, which in a civilized society is the right and duty of the State, and of the State, alone. To coin a phrase, it attempts to create a *Private Criminal Law* in a constitutional system which

assigns the whole power of punishment to the Government itself, under rigid safeguarding limitations.

Recompense, remedy, compensation, damages: all these an injured plaintiff may properly recover in his own right. Vengeance? No. Vengeance is Mine, saith the Lord. Rom. 12, 18.

Is this not the reason, despite the contractual injustice, that The Merchant of Venice is a comedy? Shylock is entitled to the repayment of his loan. Plus interest. Plus costs. Plus attorneys' fees, mayhap. But a pound of flesh? Oh, villain!

The law of today finds its counterpart to the moral of The Merchant of Venice in the rule that liquidated damages in a contract is legitimate only if it does not really amount to a penalty. See discussion in Sun Printing & Pub. Assn. v. Moore, 183 U. S. 642, 22 S. Ct. 240, 46 L. Ed. 366.

This was the basis of the decision in Rex Trailer Co. v. U. S., 350 U. S. 148, 151, 76 S. Ct. 219, 221, 100 L. Ed. 149, in which the Court said:

> "Liquidated-damage provisions, *when reasonable,* are not to be regarded as penalties (citing authority) and are therefore civil in nature."

An action for damages caused by a wrong is a civil case. And no matter how we may camouflage it, for constitutional purposes, an action to punish an offense is a criminal case.

This, in effect, is what Justice Brandeis held for a unanimous court in the case of another Albrecht v. U. S., 273 U. S. 1, 8, 47 S. Ct. 250, 252, 253, 71 L. Ed. 505, when he said:

> "A person may not be punished for a crime without a formal and sufficient accusation . . . Where

there was an appropriate accusation either by indictment or information a court may acquire jurisdiction."

Let us now set the treble damage section against specific constitutional provisions.

8. Double Jeopardy.

". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

15 U. S. C. 15 is premised upon a finding of the commission of an "offense" thus: it predicates an injury by "anything forbidden in the antitrust laws." Things forbidden in the antitrust laws are misdemeanors. 15 U. S. C., §§ 1, 2, 8, 13a. By definition, a misdemeanor is an offense.

There could be no clearer case for *sameness* than in the case at bar; because defendant has been *autrefois acquit* by the jury's verdict below of having committed something forbidden in the anti-trust laws, i. e., of violating 15 U. S. C. 1, with respect to the acts alleged in the complaint. What petitioner is seeking here is a *retrial* of the very same offense on the same complaint, for error in the first trial in which defendant was found not guilty. This, in an action for punishment, is constitutionally forbidden.

We therefore need not consider, for the application of the double jeopardy clause to this suit the somewhat narrow distinctions, made in cases involving a civil trial for liquidated damages, following a criminal trial for punishment, which mark the narrow line between such cases as Rex Trailer Co. v. U. S., 350 U. S. 148, 76 S. Ct. 219, 100 L. Ed. 149, and U. S. ex rel. Marcus v. Hess, 317 U. S. 537, 63 S. Ct. 379, 87 L. Ed. 443, on the one side, and U. S. v. La Franca, 282 U. S. 568, 51 S. Ct. 278, 75 L. Ed. 551, on the other.

But for completeness, we should point out again here that actions under 15 U. S. C. 15, as to the double and triple recovery are not by any stretch of the imagination actions for liquidated damages—they are, as to the double and triple recovery *for punishment,* by all criteria. This necessarily throws cases upon 15 U. S. C. 15 on the La Franca side of the line.

A remand of this case looking toward any result than a judgment for defendant would put the defendant in jeopardy for a second time of being *punished* for the same *offense* against the United States, of which it was *autrefois acquit* in an identical proceeding.

9. Self Incrimination.

". . . nor shall be compelled in any criminal case to be a witness against himself . . ."

One of the consequences of casting in the form of a civil action a proceeding for the imposition for a penalty is that the rules of civil procedure, rather than those of criminal procedure, are applied.

Defendants in such a case as this are bound to give depositions, to answer interrogatories under oath, to admit facts and the genuineness of documents and to produce for inspection and copying documents and other evidence in their possession. Various penalties are imposable by Rule 37, F. R. C. P., for refusal on the part of such a defendant thus to incriminate himself, *including* 37 (b) 2 (iii), the imposition of *judgment by default.*

This constitutional provision is by its terms applicable only "in any criminal case". But have we not a criminal case where, as we have seen, the object of the proceeding is to inflict punishment for an offense against the United States?

Then, is not the sanction of a default judgment (short of torture) the very ultimate of compulsion? *If you don't give evidence against yourself, you will be denied a trial and punished just as if you had been found guilty.*

If the authorization of random civil treble damage suits is a constitutionally acceptable method of inflicting punishment for violations of the anti-trust laws, it has to be equally proper for punishing violations of any other law, and of all laws. A lazy or a cheap government could in this wise avoid the trouble of prosecuting any crimes, letting all laws be enforced by proxy. Under such a scheme the guaranty against self-incrimination is reduced to an abstract and useless platitude, by a chicane.

10. Trial by Jury.

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . ."

Petitioner's "Question Presented" poses a violation of the Act "as a matter of law." Pet. 2. He complains of the failure of the trial court to sustain his motion for judgment n. o. v. on the ground that the facts showed a violation as a matter of law of Section 1 of the Sherman Act. Pet. 10. In his Court of Appeals brief (Br. 36) plaintiff's initial and principal point was:

> "The District Court erred in Not Sustaining Plaintiff's Motions for Summary Judgment, for a Directed Verdict and for Judgment Notwithstanding the Verdict."

Such relief is possible in appropriate circumstances in a civil trial.

In a criminal trial in a federal court, however, such relief is not constitutional under the Sixth Amendment.

The leading authority on this subject is U. S. v. Taylor, 11 Fed. 470, Cir. Ct. Kans. 1882, which, though cited many times, has never been criticized or overruled.

The Court said (l. c. 471, 472):

> "It is very difficult to see upon what principle it can be maintained that an accused person has had a trial by an impartial jury, within the meaning of the constitution, in a case where the court has directed the jury, without deliberation, to find him guilty. It would seem that such a trial is, in substance and effect, a trial by the court quite as much as in a case where a jury is waived by consent of the accused.
>
> "The constitution does not deal with the form, but with the substance, the essence, of the trial, and therefore requires a submission of the case to the jury for their consideration and decision upon it. There can, within the meaning of the constitution, be no trial of a cause by a jury unless the jury deliberates upon and determines it.
>
> "It is doubtless true that, in a certain sense and to a limited extent, this doctrine makes the jury the judges in criminal cases, of both law and fact; but this is the necessary result of the jury system, so long as the absolute right of the jury to find a general verdict exists, for a general verdict necessarily covers both the law and the fact, and embodies a decision based upon and growing out of both.
>
> "It has accordingly long been well settled that, while the court is the judge of the law and may instruct the jury upon the law, and while it is the duty of the jury to receive the law from the court, it is still within the power of the jury to render a general verdict, and thereby to decide on the law as well as the facts. It has never, to my knowledge,

been claimed that if the jury disregard the law as laid down by the court, and render a general verdict of not guilty, the court can set it aside; and if this cannot be done by an order after verdict, how can the court do substantially the same thing by an instruction before verdict? The action of the court is, in effect, the same in either case; it is in effect a decision by the court, upon the law and facts, that the accused is guilty. The court must determine both the fact and the law, whether it directs a verdict of guilty, or sets aside a verdict of not guilty. It may be going too far to say broadly that the jury have a right to disregard the instructions of the court upon questions of law, although many courts have gone to this extent; but it is quite clear that the right to render a general verdict includes the power to decide both law and fact, and therefore necessarily the power to decide independently of the court."

In 1965 this holding was cited in a footnote to the opinion in Byrd v. U. S., 342 F. 2d 939, 942, Dist. Col. Cir., as "holding that the judge can never direct a verdict of guilty no matter how conclusive the evidence."

And in 1965 it was cited with approval by the Supreme Court in Singer v. U. S., 380 U. S. 30, 31, 32, 85 S. Ct. 783, 788, 13 L. Ed. 2d 630.

As we have seen, to the extent of two-thirds of the recovery, this is an action for the punishment of a public offense. In substance, to this extent, it is a criminal prosecution.

The Bill of Rights is written from the standpoint of the defendant. What cares he whether the prosecution is denominated "civil" or "criminal", if it is to impose punishment upon him for the violation of a crim-

inal statute, and if the same Marshal satisfies the judgment for that punishment by an identical levy issued out of the same Court against the same property?

The only relief petitioner seeks here is a judicial determination by the Court, independent of the jury, that the defendant did, as a matter of law, violate Section 1 of the Sherman Act, and must be punished therefor; the jury only to fix the penalty.

The relief petitioner seeks is violative of the Sixth Amendment of the Constitution, and since this enactment of Congress would authorize such relief, it must be unconstitutional.

11. Excessive Fines.

". . . nor excessive fines imposed."

We have seen that this is an action for punishment of a public offense by exacting the payment of money as a penalty.

This is the very definition of a fine.

Century Dictionary, Fine, 5:

"The exaction of a money payment as a punishment for an offense . . ."

Webster's New International, Fine:

". . . a certain payment of money imposed as punishment for an offense."

Oxford English Dictionary, Fine, sb. 8 b:

"A certain sum of money imposed as the penalty for an offense."

Is the fine provided by 15 U. S. C. 15 *excessive* in the constitutional sense?

The provision doubtless has for its father the statute of 1 William & Mary, Ch. 2, Martin v. Johnson, 11 Tex. Civ. App. 633. This statute gives little elucidation to the meaning of "excessive". But the grandfather of the provision is doubtless clauses 20, 21 and 22 of the Magna Carta of 1215. These do illuminate the provision. They read (Adams & Stephens, Select Documents of English Constitutional History, 45):

> "20. A free man shall not be fined for a small offence, except in proportion to the measure of the offence; and for a great offence he shall be fined in proportion to the magnitude of the offence, saving his freehold; and a merchant in the same way, saving his merchandise; and the villain shall be fined in the same way, saving his wainage, if he shall be at our mercy; and none of the above fines shall be imposed except by the oaths of honest men of the neighborhood.
>
> "21. Earls and barons shall only be fined by their peers, and only in proportion to their offence.
>
> "22. A clergyman shall be fined, like those before mentioned, only in proportion to his lay holding, and not according to the extent of his ecclesiastical benefice."

Fines, said the barons at Runnymede, may be imposed only: "in proportion to the measure of the offence"; "in proportion to the magnitude of the offense"; "in proportion to their offence."

But the fine imposed by 15 U. S. C. 15 bears no relation whatever to the magnitude of the offense. It is tied arbitrarily to the plaintiff's damages. Two plaintiffs may suffer damages from the very same violation of the anti-trust laws. One may have suffered $1.00 damages; another $1,000.00. The fine imposed in the one case is

one thousand times that imposed in the other. The magnitude of the offense is the same in each case because it is the same offense in each case.

Or, assume there are two defendants, one which designed, proposed and carried out the offense, and imposed the conspiracy by some duress upon the other, whose part was purely passive. Because the fine is tied solely to the plaintiff's damages, and because of the rule of joint liability of joint tort feasors, both defendants, the relative magnitude of whose offenses may be as one thousand to one, must each pay the identical fine.

Some cases have sanctioned different fines according to the wealth of defendants; as in the case of the clergyman. (Magna Carta 23) or as in the case of the paradox of "punitive damages". It may be doubted whether this criterion is constitutionally permissible in itself;* but not even such a criterion as this is employed under 15 U. S. C. 15. Be the defendant a millionaire or a pauper, viciously criminal or merely passive, his fine is to be twice the damages that plaintiff can prove, and neither more nor less. Neither court nor jury has any discretion as to the amount of the punishment, nor is the amount of the fine ascertainable from the reading of the statute. The amount of the fine under the statute is not set by the statute, nor given, with or without criteria, to the discretion of the jury or the judge. It is left wholly to hazard.

The fine explicitly provided by Section 1 of the Act is $50,000—the largest fine for any offense on the books by a good deal.

But in this case there is sought a fine of $232,000 (two-thirds of $348,000, T. 13); and in the electrical and motion-picture anti-trust cases the fines sought soared into the hundreds of millions of dollars.

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*. Griffin v. Illinois, 351 U. S. 12, 16, 76 S. Ct. 585, 595.

Where Congress sets the maximum fine at $50,000, is not a statute which sets a fine for this identical offense in such random terms, that it may come to an amount limited only by the timidity of plaintiff's counsel and the mercy of an outraged jury, one which imposes an excessive fine?

12. Search Supported by Oath.

> "... no warrant [for search or seizure] shall issue but upon probable cause, supported by oath or affirmation."

Under (or preliminary to) a forthrightly criminal form of prosecution for violation of Section 1 of the Sherman Act, the government would have no right to search for evidence on the premises of the defendant except pursuant to a warrant issued on a showing of probable cause supported by oath or affirmation.

It may be argued that the showing of "good cause" of Rule 34, F. R. C. P., is the constitutional equivalent of "probable cause" in the Fourth Amendment, although some doubt may be cast on this by the "serious probable cause question" posed respecting the "reasonable ground" requirement of the statute in Berger v. New York, 35 L. W. 4649, 4652. It may also be argued that the "designating" in the court's order under 34 F. R. C. P. is the constitutional equivalent of the "particularly describing" requirement of the Fourth Amendment, although the broad scope permitted by the proviso of Rule 26 b may not meet the amendment's demands.

But there can be no dispute that an order for inspection under Rule 34 F. R. C. P. does not require that the showing be *supported by oath or affirmation,* an absolute requirement of the Fourth Amendment.

Albrecht v. U. S., 273 U. S. 1, 5, 47 S. Ct. 250, 251, 71 L. Ed. 505.

Thus the effect of casting in the form of a civil proceeding an action for punishment for the commission of a crime is to make the rules of civil procedure applicable, and thus to subvert the protection of the Fourth Amendment. As 15 U. S. C. 15 does this, it is unconstitutional.

13. Due Process of Law.

Due Process of Law in the Fourteenth Amendment includes within its concept all of the other constitutional guarantees we are dealing with, insofar at least* as those guarantees are:

". . . implicit in the concept of ordered liberty . . ."

Palko v. Connecticut, 302 U. S. 319, 325, 58 S. Ct. 149, 152, 82 L. Ed. 288.

By 1965 Justice Goldberg was able to summarize in his concurring opinion in Pointer v. Texas, 380 U. S. 400, 411, 412, 85 S. Ct. 1065, 1072, 13 L. Ed. 2d 923 as follows:

> "Thus the Court has held that the Fourteenth Amendment guarantees against infringement by the States the liberties of the First Amendment, the Fourth Amendment, the Just Compensation Clause of the Fifth Amendment, the Fifth Amendment's privilege against self-incrimination, the Eighth Amendment's prohibition of cruel and unusual punishment, and the Sixth Amendment's guarantee of the assistance of counsel for an accused in a criminal prosecution."

If Due Process of Law means all this in the Fourteenth Amendment, it must mean as much in the Fifth.

Thus *prima facie* the denial by this statute of the specific rights discussed in our brief constitutes also a dep-

* We say "at least" because the appellant's arguments in Palko may yet become the law. Cf. Adamson v. California, 332 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903.

rivation of due process. But due process is broader than this. It is a *"constitutional promise of a fair trial."* Griffin v. Illinois, 351 U. S. 12, 17, 76 S. Ct. 585, 590, 100 L. Ed. 891.

In the particular we would now urge upon the Court, Due Process means that a statute declaring or punishing a wrongful act must give the citizens, with reasonable accurateness, fair warning both of the nature of the act and of the consequences of violating it.

In Connally v. General Construction Co., 269 U. S. 385, 391, 46 S. Ct. 126, 127, this Court held:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law . . ."

In Giaccio v. Pennsylvania, 382 U. S. 399, 402, 403, 86 S. Ct. 518, 520, 521, the Court held:

> "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case."

Almost universally, statutes fixing fines do so by expressing the maximum, and usually also the minimum, within which court or jury shall exercise its discretion.

Consequently, we have found no cases expressly holding that definiteness of penalty (within *some* limits) is a requisite of due process. Yet the concurring opinion of Mr. Justice Stewart in Giaccio v. Pennsylvania, l. c. 405, and 522, reads the court's opinion as serving:

> ". . . to cast grave constitutional doubt upon the settled practice of many states to leave to the unguided discretion of a jury the nature and degree of punishment to be imposed upon a person convicted of a criminal offense."

And the author of the note in 1966 Duke Law Journal 792, 799 argues:

> "This language [Giaccio, supra] might indicate that guidelines must be furnished to limit the jury's discretion in differentiating conduct deserving of a lesser penalty from conduct deserving of a greater penalty. Otherwise the conduct for which the defendant might be punished (through an increase in sentence) would be undefined, and the jurors' determination would reflect *their* definition of what constitutes punishable conduct."

Also, if due process truly does embrace protections which are "implicit in the concept of ordered liberty," it embraces the prohibition of ex post facto laws, which was considered by the drafters of the Constitution so important as to be included not once, but twice, and not in the ten amendments, but in the body of the Constitution (Art. I, Sec. 9, par. 3; Sec. 10, par. 1).

Now the ex post facto provisions prohibit not only an after-the-fact definition of the offense, but also an after-the-fact increase of the penalty. Thompson v. Utah, 1898, 170 U. S. 343, 351, 18 S. Ct. 620, 42 L. Ed. 1061.

It is true that the formula for the penalty of 15 U. S. C. 15 was not increased after the commission of the acts

in issue here, and that the statute cannot be claimed to be literally *ex post facto*. Yet the prohibition of the ex post facto clauses is held to include the requirement that a citizen be able to learn, before he takes a given step, not only what is a crime, but what is the penalty for committing it.

If it be constitutional for a statute not to express any penalty, or, as here, to express it in terms of a formula containing variables over which neither wrongdoer nor court nor jury can have any control, then what is the sense of a constitutional prohibition against increasing such a penalty? If the wrongdoer cannot know what the punishment may turn out to be—if the blue sky is the limit, so to speak—how is he helped by a prohibition against increasing the penalty?

So if the statutory formula for the penalty to be imposed for the commission of a given crime is so vague or so dependent upon uncontrollable factors that the extent of the punishment simply cannot be determined in advance, the policy of fairness required by due process will make the statute unconstitutional.

This statute adds to the $50,000 specific fine imposable for a violation of the anti-trust law, an additional fine, the amount of which could never be anticipated, even "within an order of magnitude", as the physicists say. Because of the retroactive applicability of the rule of proximate cause, the amount of damages recoverable for a wrongful act may be totally unimaginable at the time the wrong is done. The punishment provided by this statute for its violation (in addition to the $50,000) is an amount which is two times an unknowable (the amount of damage), times another unknowable (the number of persons to be injured). This may be just and reasonable as far as the recovery of actual damages is concerned. But because of the statutory relation of the punishment, not

to the crime itself, nor to the "magnitude of the offense" —but to the damages which result therefrom, the amount of the punishment imposed by this statute is purely casual, and hence capricious. It takes property without due process of law.

14. Executive Prerogative.

Article II:

Sect. 1: "The executive power shall be vested in a President of the United States of America."

Sect. 2: "The President . . . shall have power to grant reprieves and pardons for offenses against the United States."

Sect. 3: ". . . he shall take care that the laws be faithfully executed, and shall commission all officers of the United States."

In these days of waning Congressional power, vis-a-vis the President, it is an unusual thought that a statute is void because it takes constitutional authority away from the executive. True, the President has not complained.

But the defendant, as a constitutional person, has the constitutional right, when it is to be prosecuted for punishment for an offense, to require that the proceedings for its punishment be initiated and carried out by the appointed constitutional authority,—not by some person who might have a personal grudge. Indeed, considering that the class of person designated by the statute is limited to those who have been damaged by the very acts for which defendant is to be punished, and considering that the plaintiff must profit on his injury by two hundred per cent, the vindictive prosecution of the statutory scheme for punishment is not just a possibility, it is a built-in certainty. Yet a fair prosecutor is a part of the fair trial required by Due Process. Miller v. Pate, 35 L. W.

4179, 87 S. Ct. 785. And the Constitution puts the authority for executing and enforcing the laws in the President of the United States, and in him only.

This statute creates a *President by proxy* to hold part of the executive power and to fulfill the presidential obligation of seeing that the laws be faithfully executed. And the proxy President is appointed not by the elected President, and not really by Congress, but by happenstance.

Of course, the President may, and often must, act through agents. But in such cases it is the President himself who must commission them. Not Congress, nor the hazard of who happened to suffer damage, or claims that he did. Is not a plaintiff, insofar as he seeks to impose punishment for an offense against the United States, acting as an officer of the United States, just as a U. S. Attorney might do? If not, in whose right is he acting? And if he is *in substance* an officer of the United States, he must be commissioned by the President.

Lastly and most importantly, the Constitution gives the President the power to grant reprieves and pardons for offenses against the United States. This is a provision of the Constitution which a defendant, upon whom punishment (which might amount to hundreds of thousands of dollars) had been imposed under this statute, might find of some solace.

But the form of the proceeding laid down by Congress for the imposition of this punishment preempts this power. For the statute makes the penalty the property of the plaintiff (for no just reason) which, if valid, not even the President can take away. Pardoning Power of President, 5 Opinions, Attorney General, 579.

Again we say form must yield to substance. If the statutory scheme deprives a defendant of his constitu-

tional right to petition the President for a pardon from the penalty exacted for his offense, the statute, and not the Constitution, must yield.

15. Reductio Ad Absurdum.

If we grant, as we must, that two-thirds of the recovery authorized by the statute, 15 U. S. C. 15, is a penalty to be inflicted for a public offense, ceded by the sovereign to the random plaintiff, we find ourselves facing an absurdity:

Suppose this statute, instead of giving the civil suit, anti-trust; plaintiff his damages as recompense, plus double his damages as a penalty imposed upon defendant, had given such a plaintiff, in addition to his damages, the right to imprison the defendant for a year. Would this be constitutional? Hardly!

Yet it would not be unconstitutional as a cruel or unusual punishment. Imprisonment is no more a cruel and unusual punishment than is a fine.

Nor would it violate Amendment XIII, which prohibits involuntary servitude "except as a punishment for a crime." Defendant would have been found to have committed a crime.

Then why would it be unconstitutional? Only because, we say, such a statute would delegate to the private plaintiff, by a sort of letter of marque and reprisal, *the right to punish,*—a right reserved, by the Constitution, wholly and exclusively, to the President of the United States; and it would give this right free of the constitutional limitations imposed upon Government prosecutions.

One's instinctive conviction of the illegality of punishment by incarceration in a civil action is immediate, because incarceration cannot give the plaintiff compensation, any more than could Shylock's pound of flesh, and compensation is the only legitimate business of the civil law

of damages. Treble damages has escaped this intuitive revulsion because of the misleading use of the word "damages". If we once thoroughly recognize that two-thirds of the statutory grant is for punishment, and nothing else than punishment, we must reach the conclusion that it is to the imposition of *punishment as such* that the protection of the Constitution reaches. And if this be so, the concept of *private criminal law* implicit in this statute fails against the Constitution as readily where the action is for punishment by fine as where it is for punishment by imprisonment.

(h) Conclusion.

Since the statute is unconstitutional, it cannot support a recovery, nor confer jurisdiction upon this Court or the Courts below to impose a recovery in this case. The judgment below must be affirmed, or the petition for certiorari dismissed.

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